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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1309

DENNIS TURNER, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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CITATIONS

Cases:

Ashe v. Swenson, 387 US 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970)

Davis v. O'Hara, 266 US 314, 45 S.Ct. 104 69 L. Ed. 303 (1924)

Davis v. Wechsler, 263 US 22, 24 (1923)

Duvall v. State, 111 Ohio St. 657, 146 NE 90 (1924)

Eagle v. Florida, Fla , 249 So.2d 460 (1971)

Harris v. State, 193 Ga. 109, 175 E2d 573, 147 ALR 980 (1941)

Harris v. Washington, 404 US 55, 92 S.Ct. 183 (1971)

People v. Cunningham, 62 Misc. 2d 515, 308 NYS2d 990 (March 1970)

Reece v. Georgia, 350 US 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955)

Simpson v. Florida, 403 US 384, 91 S.Ct. 1801 (1971)

State v. Barton, 5 Wash. 234, 105 P.2d 63, (1940)

State v. Greely, 30 NJ Super. 542, 103 A2d 639, Affd. on op. below 31 NJ Super. 542, 107 A2d 439 (1954)

State v. Hall, 86 Idaho 63, 383 P.2d 602 (1963)

Turner v. State, 248 Ark. 367, 452 SW2d 317 (1970)

Turner v. State, 251 Ark. 499, 473 SW2d 904 (1971)

Urie v. Thompson, 337 US 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 ALR2d 252 (1949)

Other Material:

United States Constitution, Amend. V

United States Constitution, Amend. XIV

Moore's Federal Practice, Vol. 1B, Paragraph 0.404(10)

9 ALR3d 254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. _____

DENNIS TURNER, *Petitioner*

v.

STATE OF ARKANSAS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner Dennis Turner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas in this proceeding, which judgment became final on January 10, 1972.

OPINION BELOW

The opinion of the Supreme Court of Arkansas appears in the Appendix hereto. It is reported at 251 Ark 499, 473 SW2d 904.

JURISDICTION

The judgment of the Supreme Court of Arkansas was entered on November 29, 1971. It became final on January 10, 1972, when Petitioner's timely petition for rehearing was denied. This peti-

tion for certiorari was filed within ninety days of the latter date. This Court has jurisdiction under 28 USC Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner's federal right of protection against double jeopardy was violated by an indictment for robbery after an acquittal of murder while in perpetration of that robbery.

2. Whether a consideration of the above question is forestalled by the doctrine of "law of the case."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part:

> nor shall any person be subject for the same offense to be twice put in peopardy of life or limb.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> nor shall any State deprive any person of life, liberty, or proprety, without due process of law . . .

STATEMENT OF THE CASE

On April 24, 1969, a jury in the Circuit Court of Hempstead County, Arkansas, returned a general verdict of not guilty on an information charging the Petitioner with murdering Larry Wayne Yates while robbing him. (App. p. 1a).

On October 3, 1969, a grand jury of the Circuit Court of Hempstead County, Arkansas, returned an indictment charging Petitioner with the same robbery as alleged in the murder information (App. p. 15a). In response to that indictment, the Petitioner filed his motion to dismiss based upon double jeopardy. The Trial Court denied the motion and appeal was taken to the Supreme Court of Arkansas. At this point the transcript of the prior murder trial was not a part of the robbery case record on appeal. In *Turner v. State*, 248 Ark 367, 452 SW2d 317, dated March 30, 1970, that Court affirmed the Trial Court (App. p. 2a). The Supreme Court of Arkansas mentioned the doctrine of res judicata in its opinion. It found, however, that since Arkansas statutory criminal procedure prevented the murder charge and the robbery charge from being joined together for trial, the acquittal on the murder charge could not be con-

sidered an adjudication on the robbery charge and res judicata did not apply (App. p. 9a).

Seven days after that decision this Court delivered the opinion of *Ashe v. Swenson*, 397 US 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) stating that the principle of collateral estoppel applies to the double jeopardy provision of the Fifth Amendment of the Constitution of the United States. Under the strict rules of the Supreme Court of Arkansas for petitions for rehearing, (Rule 20), i.e. filed within seventeen (17) calendar days of the decision; no extensions of time for filing except illness or casualty; petition, brief, style of the case and certificate of counsel not to exceed two legal size, double spaced, typewritten pages; Petitioner filed petition for rehearing arguing the application of *Ashe v. Swenson*, supra. Such petition was denied without opinion.

Petitioner then had prepared the seven hundred page transcript of the prior murder trial, submitted such into the Trial Court record of the robbery case and moved that Court for a dismissal of the robbery indictment on the basis of *Ashe v. Swenson*, supra. The motion was denied and appeal was taken to the Supreme Court of Arkansas. In case of *Turner c. State*, 261 Ark 499, 473 SW2d 904, the

Trial Court was affirmed by the Supreme Court of Arkansas based upon the doctrine of "law of the case." (App. p. 16a.) The total reasoning of the Supreme Court of Arkansas on the point was contained in one paragraph, (App. p. 20a):

> "The rationale of *Ashe* is that "collateral estoppel' is encompassed within the ambit of double jeopardy constitutional prohibitions. See also, *De Sacia v. State*, 469 P.2d 369 (Alaska 1970); *State v. Hite*, 3 Wash. App. 9, 472 P.2d 600 (1970). The terms 'collateral estoppel' and 'res judicata' are ofter used interchangeably in criminal cases. *De Sacia v. State*, supra. The former has been considered an aspect of the latter. *Hoag v. New Jersey*, 365 US 464, 78 S.Ct. 829, 2L.Ed.2 913 (1958), reh. denied, 367 US 933, 78 S.Ct. 1366, 2L.Ed. 1375 (1958). See 46 Am. Jur. 2d 565, Judgments Secs. 397; Stone, Res Judicata in Criminal Cases, 27 Texas Law Review 231 (1948). Because 'collateral estoppel' is included in both concepts relied upon by the appellant in both motions, there can be no doubt that the decision on the first appeal governs this appeal as the law of the case."

Petitioner timely filed his petition for rehearing which was denied without opinion on January 10, 1972.

It was stipulated (App. p. 12a) in the record of the second appeal by Petitioner and the State that:

(a) The exact same evidence and no

more will be introduced at the robbery trial as was introduced at the murder trial.

(b) If Petitioner did not kill or participate in the killing of the deceased, he did not rob or participate in the robbing of the deceased.

The murder trial record reflects that the deceased was found shot to death on a back road outside of Hope, Arkansas early in the morning of December 25, 1968. The police were directed to the body by Richard Turner and Johnny Mitchell.

Turner and Mitchell testified that they, Petitioner and the deceased, played poker together in Hope on the evening of December 24 and predawn of December 25, 1968. That after the game broke up, the Petitioner and the deceased took Turner to his home in Hope. That unknown to the deceased, Petitioner borrowed the murder gun and shells from Turner and left with the deceased. That shortly thereafter Petitioner went to both of their homes and told them he had shot the deceased and gotten his money. That he told them where the body was and asked them to lie for him. That they then went to the police and reported the whole matter.

The police stated they went to Petitioner's home

in Hope that morning and found him asleep. That when they questioned the Petitioner about the gun and money, he located them in the closet in his bedroom.

Petitioner testified that he drank alot at the poker game and had also been taking aspirin and cold medicine. He got very drunk and dizzy and did not remember anything from the time the game broke up until he awoke alone in his car parked in front of his home at dawn. He had a pistol stuck in his belt and a strange billfold in his left front pocket. He went inside, threw the things in his closet and went to bed. He was awakened by the police. When repeatedly questioned by them about the gun and the money, he recalled the items and where they were.

The gun was positively indentified as the murder weapon and the billfold as belonging to the deceased.

REASONS FOR GRANTING THE WRIT

1. This Court held in *Ashe v. Swenson*, supra, where a previous judgment of acquittal was based upon a general verdict, a court considering the issue of double jeopardy must examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and con-

clude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. This is the approach that will assure the application of the principle of collateral estoppel with realism and rationality.

The Trial Court and the Supreme Court of Arkansas have refused to adhere to that mandate. In the first appeal, *Ashe v. Swenson*, supra, and its requirements were brought to the attention of the Court on petition for rehearing. Even with that, the Court allowed its decision to stand. That Court did not review the "pleadings, evidence, charge and other relevant matters" of the prior murder trial. That Court ignored the principle of collateral estoppel and instead based its judgment upon a concept of "mutuality" when it stated: (App. p. 9a)

> "The only question determined in the murder trial was whether Turner was guilty of murder. That question has now been adjudicated. But the question of whether he was guilty of robbery was not adjudicated in the first case, and under our statutes, could not have been determined. Murder and robbery cannot be joint together in one indictment. Ark. Stat. Ann. Sec. 43-1010 (Repl. 1964). In fact, there is no offense that can be jointly tried with murder, although that charge includes both first and second degree murder, and man-

> slaughter. Since Turner could not legally be tried for the offense of robbery at the same time he was being tried for murder (and was not so tierd), his acquittal on the murder charge certainly was not an adjudication of his guilt or innocence on the robbery charge."

This fallacious concept of "mutuality" is expressly overruled in *Ashe v. Swenson*, supra, at Page 443, and also in *Simpson v. Florida*, 403 U.S. 384, 91 S.Ct. 1801 (1971).

In that first appeal, the Supreme Court of Arkansas cites at length the case of *State v. Barton*, 5 Wash. 234, 105 P.2d 63 (1940) to support its decision. Those erroneous ideas of the Washington court about double jeopardy were corrected by this Court in the case of *Harris v. Washington*, 404 US 66, 92 S.Ct. 183 (1971).

This application of collateral estoppel to a felony murder situation is not novel to this petition. Prior to *Ashe v. Swenson*, supra, several states would not allow the later prosecution for the named felony after the prior acquittal of the felony murder, *Harris v. State*, 193 Ga 109, 175 SE2d 573, 147 ALR 980 (1941); *State v. Greely*, 30 NJ Super 542, 103 A2d 639, Affd on op below 31 NJ Super 542, 107 A2d 439 (1954); *People v. Cunningham*, 62 Misc 2d 515, 308 NYS2d 990 (March 1970). Some other states

did allow the second prosecution, *Duvall v. State*, 111 Ohio St. 657 146NE 90 (1924); *State v. Hall*, 86 Idaho 63, 383 P.2d 602 (1963), *State v. Barton*, supra. See 9 ALR3d 254.

Since *Ashe v. Swenson*, supra, diligent research has uncovered only one such case other than the case of the Petitioner. In *Eagle v. Florida*, ___ Fla, ___ 249 So2d 460, (1971), the Court applied *Ashe v. Swenson*, supra, and refused the attempted second prosecution.

The State of Arkansas by the stipulation of record has admitted that the issue of guilt of robbery was determined in Petitioner's favor when he was found not guilty of murder while in perpetration of robbery (App. p. 14a). Therefore, under *Harris v. Washington*, supra, the constitutional guarantee applies and the robbery trial cannot be held.

A thorough review of the evidence and testimony of the murder trial reveals that Petitioner was found by a rational jury not to be criminally responsible for whatever crimes were committed upon the deceased that evening. Any other interpretation of the jury's finding is not supported by the proof. All of the evidence is that whoever killed the deceased also robbed him. Whoever robbed the de-

ceased also killed him. The same evidence and no more would be presented at the robbery trial. All of this is even stipulated by the State (App. p. 14a). Petitioner has once faced that evidence and been declared innocent. He cannot be made to face it again.

2. In the second appeal the Supreme Court of Arkansas had the full record of the murder trial before it plus the directions of this Court from *Ashe v. Swenson*, supra, to review that record. Again that Court defaulted in its duty. It held that the principle of "law of the case" prevented it from deciding Petitioner's appeal on its merits. This Court clearly has jurisdiction to consider all of the substantial federal questions determined in the earlier stages of the litigation, *Urie v. Thompson*, 337 US 163, 69 S.Ct. 1018, 93 L.Ed. 1282, 11 ALR2d (1949). This Court's right to re-examine such questions is not affected by this ruling that the first decision of the Supreme Court of Arkansas became the law of the case, *Davis v. O'Hara*, 266 US 314, 45 S.Ct. 104, 69 L.Ed. 303 (1924); *Reece v. Georgia*, 350 US 85, 76 S.Ct. 167, 100 L.Ed. 77 (1955). See 1B Moore' Federal Practice, Paragraph 0.404 (10).

It is worth emphasizing again that the right

claimed here is based upon the federal constitution. The words of Mr. Justice Holmes in *Davis v. Wechsler*, 263 U.S. 22, 24 (1923), are directly applicable: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." There is no question but that Petitioner has a federal right to have his case determined on its merits.

Most of the criminal law of this country is, and should be, enforced in the state courts. In the course of their discharge of this duty, those courts will inevitably be asked on many occasions to rule on claims of federal right. This Court obviously cannot superintend the manifold details of state criminal practice. But it can be alert to see that fairly presented federal claims are decided on their merits. Here, Petitioner's right to a state-court adjudication of the merits of his federal claim is at stake. This case thus presents a frequently recurring problem in the administration of criminal justice—a problem deserving of this Court's time and attention.

CONCLUSION

The writ of certiorari should be granted to review the judgment of the Supreme Court of Arkansas. On plenary consideration, that judgment should be reversed and the cause remanded for a new trial, or, in the alternative, the cause should be remanded to the Supreme Court of Arkansas with instructions to that court to decide Petitioner's federal claim on its merits.

Respectfully submitted,

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APPENDIX

INFORMATION

IN THE HEMPSTEAD COUNTY CIRCUIT COURT

THE STATE OF ARKANSAS

vs.

DENNIS TURNER

No. 5767

INFORMATION FOR FIRST DEGREE MURDER

I, W. F. Denman, Jr., PROSECUTING ATTORNEY WITHIN AND FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Hempstead County is a part, in the name and by the authority of the State of Arkansas, on oath accuse the defendant, Dennis Turner of the crime of First Degree Murder committed as follows, to-wit: The said Defendant on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully, wilfully, feloniously and violently take from the person of one Larry Wayne Yates, in the County aforesaid, a sum of money in excess of $300.00 in current and lawful money of the United States, forcibly and against the will of the said Larry Wayne Yates and by intimidating and putting fear in him the said Larry Wayne Yates, and while perpetrating said crime of robbery as aforesaid, feloniously, wil-

fully and with malice aforethought, and with premeditation and deliberation did kill and murder one Larry Wayne Yates, with a certain gun loaded with gunpowder and leaden bullets, and then and there held in the hands of the said Dennis Turner, from the effects of wounds so inflicted he the said Larry Wayne Yates died on the 25th of December, 1968, in violation of Ark. Stat. 41-2205, against the peace and dignity of the State of Arkansas.

W. F. DENMAN, JR., Prosecuting Attorney.

By: Norman M. Smith, Deputy P.A.

Subscribed and sworn to before me this 27th day of December, 1968.

Jim Cole, Circuit Clerk.

Admit to Bond in the Sum of $_____

By: Leona Cole, Deputy Circuit Clerk.

SUPREME COURT OF ARKANSAS

DENNIS TURNER,

Appellant

vs.

STATE OF ARKANSAS,

Appellee

No. 5488

Appeal from the Circuit Court of Hempstead County

Honorable W. H. Arnold, III, J.
Opinion Delivered March 30, 1970
Affirmed.

CARLETON HARRIS, Chief Justice

The issue in this case is whether appellant, Dennis Turner, who was tried and acquitted of first degree murder can now be charged and tried for robbery which arose out of the same act. The appellant was charged by the filing of an Information with "willfully, feloniously and violently taking from the person of Larry Wayne Yates, on the 25th day of December, 1968, a sum of money in excess of $300.00 in currency, forcibly and against the will of said Larry Wayne Yates, by intimidating and putting in fear the said Larry Wayne Yates and while perpetrating robbery, Defendant Dennis Turner did feloniously, willfully, and with malice aforethought, and with premeditation and deliberation, did kill and murder Larry Wayne Yates with a gun *** in violation of Arkansas Statute 41-2205."

Appellant was acquitted of murder by a jury on April 24, 1969, and was charged by a grand jury indictment on October 3, 1969, with the crime of robbery. The appellant sought dismissal of the indictment on the grounds that it constituted double

jeopardy, and *res judicata*. The Court denied appellant's motion to dismiss and granted him this appeal. For reversal appellant contends that the doctrine of double jeopardy and *res judicata* preclude a relitigation of the issue of robbery between the state and the appellant. Five points are asserted for reversal, but all relate to these two issue.

On appeal it is stipulated: "That the murder charge, of which Defendant Dennis Turner was acquitted, and the robbery charge arose out of the same set of facts, circumstances, and the same occasion.

"That the same testimony adduced by the State of Arkansas in the murder trial will necessarily need be reintroduced in this robbery charge."

The information accusing the appellant with murder was two-pronged: (1) that the murder was committed in perpetration of the crime of robbery and (2) that appellant committed the murder "feloniously, willfully, and with malice aforethought, and with premeditation and deliberation." This is permissible by Ark. Stat. Ann. Sec. 41-2205 (Rep. 1964) which is our felony-murder statue.

We disagree with appellant's contentions that the indictment should be dismissed on the principle of double jeopardy. This question was discussed in

the Washington case of *State v. Barton*, 105 P.2d 63, and also in the Idaho case of *State v. Hall*, 383 P.2d 602. Both Barton and Hall had been accused of murder in the first degree, it being alleged that each killed a person while engaged in the perpetration of the crime of robbery. In each instance, there was an acquittal on the charge of murder, and the defendants were subsequently charged with robbery. In rejecting the argument of double jeopardy in *Barton*, the Washington Supreme Court said:

> "Appellant contends that the offense of murder in the first degree, as charged in the information in the prior case, necessarily includes the offense of robbery; and that, therefore, this acquittal in that case operates as a bar to the information in the present case.
>
> "A person is not put in second jeopardy by successive trials unless they involve not only the *same act*, but also the *same offense*. There must be substantial identity of the offenses charged in the prior and in the subsequent prosecutions both in fact and in law. The same act may be a violation of two difference penal statutes, in which case there may be two separate and successive prosecutions against the offender because the offenses are not the same."

Likewise, in holding against the contention of double jeopardy in *State v. Hall*, supra, the Supreme Court of Idaho said:

"The allegation that the homicide occurred in the perpetration of a felony, does not charge the accused with the commission of the felony referred to, nor make it an offense included in the murder charge; it merely characterizes the murder as to degree. ***

"The crime of murder may be committed without the commission of any of the felonies named in the statute, and the allegation that the homicide was committed while its perpetrators were engaged in a robbery does not charge that the robbery was the manner or means by which the murder was accomplished. The murder was charged to have been committed by means of a gun. The robbery was alleged only as a condition or circumstance characterizing the murder as first degree. The robbery was not an 'included offense' in the murder charge. It is clear from the statutory definitions, supra, that murder and robbery are separate, distinct and independent crimes. Neither is the 'same offense' as the other, within the constitutional provision against double jeopardy, and a prosecution for one does not bar a subsequent prosecution for the other on that ground. (Here, cases from thirteen states are cited.)"

The court then quoted from 22C.J.S., Criminal Law, Sec. 278, (1), Page 717, as follows:

"The test is the identity of the offenses, and not the identity of the occurrences or facts out of which they arise; it is not whether accused has already been tried for the same act, but whether he has been put in jeopardy for the same offense."

It definitely appears that this is the rule followed by a great majority of the states.

Though Arkansas has no exact case in point, the case of *Binganan v. State*, 181 Ark 94, 24 S.W. 2d 969, is certainly analagous. There, Binganan was convicted for forging and uttering a check, but upon appeal to this court, upon confession of error by the Attorney General, the cause was reversed. Binganan was also indicted for obtaining money under false pretenses by the issuance of the same check. He pleaded his former acquittal. In rejecting this argument, we said:

> "Nor was the plea of former acquittal available to appellant. *It is true that he was convicted of the offense for the same act, that of issuing the check upon a bank in which he had never had an account and cashing it, upon which he was convicted (of) forging and uttering the same check as a forged instrument,* [1a] but he was not put in jeopardy a second time by this trial for the same offense, but for an altogether different one. *'The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense.'* [1b] (Citing cases.)"

So, though acquitted on the charge of forgery,

1a. Emphasis supplied.

1b. Emphasis supplied.

Binganan was then convicted of false pretenses, the offense being the writing of the same identical check, and the conviction being based upon the same proof used in the forgery case.

It will be noted that the test set out in *Binganan* is the identical test set out in the general rule heretofore cited. We find no merit in this contention.

Nor do we agree that the robbery indictment should be dismissed under the doctrine of *res judicata.*

There are no criminal cases in this state relative to the application of *res judicata,* but we have several civil cases, and the principle is, of course, the same. The doctrine of *res judicata,* is discussed in several Arkansas cases. In order to sustain a plea of *res judicata,* it must appear that the cause involves the same subject matter as that *determined* or which could have been determined in a former suit between the same parties. The bar of the former judgment extends to those questions of fact and law which were decided in the former action or which might have been but were not presented. See *Ozan Lumber Co. v. Tidwell,* 213 Ark. 751, 212 S.W. 2d 349; *Andrews v. Victor Metal Products Corp.,* 235 Ark. 568, 361 S.W.2d 19.

"'"It is undoubtedly settled law that a

> judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. *But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit.*[2] If there be any uncertainty on this head in the record —as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.***"

Applying the language quoted to the case before us, it is at once apparent that *res judicata* is not applicable. The only question determined in the murder trial was whether Turner was guilty of murder. That question has now been adjudicated. But the question of whether he was guilty of robbery was adjudicated in the first case, and under our statutes, could not have been determined. Murder and robbery cannot be joined together in one indictment. Ark. Stat. Ann. Sec. 43-1010 (Repl. 1964).

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2. Emphasis supplied.

In fact, there is no offense that can be jointly tried with murder, although that charge includes both first and second degree murder, and manslaughter. Since Turner could not legally be tried for the offense of robbery at the same time he was being tried for murder (and was not so tried), his acquittal on the murder charge certainly was not an adjudication of his guilt or innocence on the robbery charge. This question was likewise discussed in the Washington case of *State v. Barton*, supra, and also in the Idaho case of *State v. Hall*, supra. On the question of *res judicata*, the Washington court said:

> "The doctrine of res judicata, as distinguished from second jeopardy, does, as appellant asserts, apply to criminal actions as well as to civil causes; but it is subject to the same limitations. One such limitation is stated in 34 C.J. 969, Sec. 1386, as follows: 'The rule as to the conclusiveness of a judgment in a criminal case is subject to the same exceptions and limitations as those which pertain to judgments in civil actions.***'
>
> "*** It is not possible to determine whether the jurors returned a verdict of acquittal because they credited the testimony in support of appellant's alibi, or for the reason that they found the state's evidence insufficient as to one or more essential elements of the offense charged. They could have utterly disregarded all of the testimony adduced by the appellant in his defense and yet have returned a verdict of not guilty.

> The verdict and the judgment based thereon were not, therefore, res judicata as to appellant's alibi, nor as to any other particular fact. They were res judicata only as to the ultimate fact that appellant was not guilty of the crime of which he was accused."

The court held that Barton's acquittal on the murder charge did not prevent his being tried on the robbery charge.

In *State v. Hall*, supra,[3] the court stated that, though Hall was acquitted of the charge of murder, the issue was never joined between the state and defendant on the charge of robbery as such, and the defendant could not have been convicted or robbery under that information. It was pointed out that the jury could have found the defendant not guilty of murder, even though the jury might have believed he was a party to the robbery.

How can *res judicata* apply to the robbery charge against Turner, because of his acquittal in the murder case, when the offense charged on that occasion was not robbery—but murder,—and when he could not have even been legally tried for robbery in the same indictment?

---

3. The Idaho statute relative to murder perpetrated while committing a felony, is almost identical with our own.

From what has been said, it is apparent that we do not agree with appellant's contentions; and we hold that the trial court did not err in refusing to dismiss the robbery indictment against appellant.

Affirmed.

Fogleman, J., concurrs; George Rose Smith, Byrd and Holt, JJ, dissent.

In the Circuit Court of Hempstead County, Arkansas
No. 5817

THE STATE OF ARKANSAS,
Plaintiff

vs.

DENNIS TURNER,
Defendant

In The Supreme Court of Arkansas
Criminal No. 5618

DENNIS TURNER,
Appellant

vs.

THE STATE OF ARKANSAS,
Appellee

AMENDED STIPULATION

The State of Arkansas, Plaintiff in the lower Court and Appellee in the Supreme Court, by and through the Presecuting Attorney for the Eighth Judicial Circuit of the State of Arkansas, of which Hempstead County is a part, W. H. Arnold, and the Defendant, Dennis Turner, by and through his retained attorney, Boyd Tackett, do hereby further stipulate:

That the evidence adduced by and on behalf of the State in Hempstead County Circuit Court Case No. 5767 (Murder while committing Robbery), upon which charge Dennis Turner was found not guilty, constitutes all of the evidence that can be utilized by and on behalf of the State in Hempstead County Circuit Court case No. 5717 and Arkansas Supreme Court Case No. 5618 (Robbery while committing Murder).

That the pleadings, evidence, proceedings, judgment, and Stipulations entered into by and between the parties and attorneys in Hempstead County Circuit Court Case No. 5767 (Murder while committing Robbery) should be considered a part of the Record in the instant case—Hempstead County Circuit Court Case No. 5817 and Arkansas Supreme Court

Case No. 5618 (Robbery while committing Murder).

That whoever (one or more people) killed Larry Wayne Yates on or about the 25th day of December, 1968, in Hempstead County, Arkansas, also robbed Larry Wayne Yates at the same time and place and on the same occasion; that whoever (one or more people) robbed Larry Wayne Yates on or about said date in said county and state also killed Larry Wayne Yates at the same time and place and on the same occasion; that if Defendant Dennis Turner killed or participated in the killing of Larry Wayne Yates he also robbed or participated in the robbing of Larry Wayne Yates; that if Defendant Dennis Turner robbed or participated in the robbing of Larry Wayne Yates he also killed or participated in the killing of Larry Wayne Yates; that if Defendant Dennis Turner did not kill or participate in the killing of Larry Wayne Yates he did not rob or participate in the robbing of Larry Wayne Yates; and that if Defendant Dennis Turner did not rob or participate in the robbing of Larry Wayne Yates he did not kill or participate in the killing of Larry Wayne Yates.

That the same testimony adduced by and on behalf of the State of Arkansas in the murder case

against Dennis Turner will necessarily be reintroduced in the robbery charge against Dennis Turner; and that there will be no additional testimony introduced by and on behalf of the State of Arkansas in the robbery charge than has been introduced in the murder case.

THE STATE OF ARKANSAS, *Plaintiff*
By: W. H. ARNOLD
Prosecuting Attorney
Eighth Judicial Circuit
State of Arkansas

DEFENDANT DENNIS TURNER
By: BOYD TACKETT
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INDICTMENT

THE STATE OF ARKANSAS

VS.

DENNIS TURNER

In Hempstead County Circuit Court, April, 1969
Indictment for Robbery

The Grand Jury of Hempstead County, in the

name and by the authority of the State of Arkansas, on oath, accuse the defendant, Dennis Turner of the crime of robbery committed as follows, to-wit: The said defendant on the 25th day of December, 1968, in Hempstead County, Arkansas, did unlawfully take from Larry Yates by force and intimidation lawful currency in the amount of Four Hundred Dollars ($400.00) belonging to the said Larry Yates, against the peace and dignity of the State of Arkansas.

Admit to bond in the sum of $2,500.00

W. H. "DUB" ARNOLD
Prosecuting Attorney, Eighth

/s/ Signature
Foreman of the Grand Jury

SUPREME COURT OF ARKANSAS

DENNIS TURNER,
Appellant

V.

THE STATE OF ARKANSAS
Appellee

No. 5618

Appeal From Hempstead Circuit Court
JOHN W. GOODSON, *Judge*
Opinion Delivered Nov. 29, 1971

Rehearing denied January 10, 1972

AFFIRMED

JOHN A. FOGLEMAN, *Justice*

This is the second time Dennis Turner has appealed from an order denying his motion to dismiss an indictment for robbery of Larry Wayne Yates. In both motions he asserted that he was entitled to a dismissal of the indictment because he had been acquitted of the murder of Yates while perpetrating the very robbery with which he was charged in the indictment he seeks to have dismissed. The first motion was based upon a plea of double jeopardy and res judicata. It was denied and we affirmed. *Turner v. State*, 248 Ark. 367, 452 S.W.2d 317. The second motion was then filed. In it appellant also pleaded double jeopardy and res judicata. It was also denied and this appeal resulted. The majority of the court feels that the order denying the motion is an appealable order. We affirm because our decision on the prior appeal is the law of the case.

Appellant admits that the only difference in the record from that presented on the first appeal is that the complete transcript of the record of the trial on the murder charge is now before us. It is accompanied by a stipulation of the prosecuting at-

torney that the evidence that will be presented on the robbery charge is the identical evidence that was presented in the murder trial. Appellant argues that under the doctrine of collateral estoppel his trial for robbery after the acquittal of murder is violative of the double jeopardy provisions of the state and federal constitutions, relying upon the decision in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2nd 469 (1970), decided seven days after our opinion on the first appeal was handed down. There the United States Supreme Court said that acquittal of Ashe of the robbery of one of six persons he was charged with having robbed simultaneously could not have been based upon anything other than a finding that Ashe had not been one of the robbers who perpetrated the crime. It then voided Ashe's conviction of the robbery of a second victim, holding that the second trial constituted double jeopardy. This holding was based upon the principle that the determination of the ultimate issue in the first trial—whether Ashe was one of the robbers—forever barred the parties, i.e., the state and the defendant, from ever litigating the same issue again under the doctrine of collateral estoppel.

We need not ponder over the application of the rule of *Ashe* to the facts of this case. The doctrine

of "law of the case" is a fundamental essential of any system of justice which permits appeals from trial court action. Without it, termination of litigation would depend upon exhaution either of the resources of the unsuccessful party or of the resourcefulness of his counsel. See *Porter v. Doe*, 10 Ark. 186; *Miller Lumber Co. v. Floyd*, 169 Ark. 473, 275 S.W. 741, Aff'd 273 U.S. 672, 47 S.Ct. 475, 71 L. Ed. 833 (1927). The application of the doctrine to criminal cases is well established. *Bowman v. State*, 93 Ark. 168, 129 S.W. 80; *Mode v. State*, 234 Ark. 46, 350 S.W.2d 675, cert. denied, 370 U.S. 909, 82 S.Ct. 1255, 8 L.Ed.2d 403 (1962). See also, *Clark v. State*, 246 Ark. 876, 440 S.W.2d 205; *Fuller and Walton v. State*, 246 Ark. 704, 439 S.W.2d 801, cert. denied, 396 U.S. 930, 90 S.Ct. 260, 24 L.Ed.2d 228 (1969). It requires that a party assert whatever objections that he may have to any step in a proceeding in a trial court prior to appeal from an adverse ruling. A decision on appeal on any question there presented forecloses further consideration of that question in subsequent proceedings in the same case, even though the argument made or ground of objection relied upon a second appeal is not identical with the argument made or ground asserted on the first appeal, if the new argument or objection could have been

urged on the first appeal. *St. Louis Southwestern Railway Co. v. Jackson*, 246 Ark. 268, 438 S.W.2d 41; *Moore, Admx. v. Robertson*, 244 Ark. 837, 427 S.W.2d 796.

The rationale of *Ashe* is that "collateral estoppel" is encompassed within the ambit of double jeopardy constitutional prohibitions. See also, *De Sacia v. State*, 469 P.2d 369 (Alaska 1970; *State v. Hite*, 3 Wash. App. 9, 472 P.2d 600 (1970). The terms "collateral estoppel" and "res judicata" are often used interchangeably in criminal cases. *De Sacia v. State*, supra. The former has been considered an aspect of the latter. *Hoag v. New Jersey*, 356 U.S. 464, 78 S.Ct. 829, 2 L.Ed.2d 913 (1958), reh. denied, 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958). See 46 Am. Jur. 2d 565, Judgments Sec. 397; Stone, Res Judicata in Criminal Cases, 27 Texas Law Review 231 (1948). Because "collateral estoppel" is included in both concepts relied upon by the appelalnt in both motions, there can be no doubt that the decision on the first appeal governs this appeal as the law of the case.

The fact that *Ashe v. Swenson* was decided by the United States Supreme Court after our opinion was rendered on the first appeal makes the doctrine

of "law of the case" no less applicable, even if it might be under circumstances other than those existing in this case. Appellant filed a timely petition for rehearing after the *Ashe* decision based substantially on that holding. We denied that petition with full appreciation of all the implications of *Ashe*.

Nor does the addition of the transcript of the record of the murder trial militate against the application of the rule. No reason appears for its not having been presented at the hearing on the first motion to dismiss.

We are aware of the decision of the United States Supreme Court in *Harris v. Washington*, No. 70-5213, decided November 16, 1971. This decision does nothing more than apply *Ashe* to a factual situation virtually identical with that in *Ashe*. That decision would not affect the application of the "law of the case."

The judgment is affirmed.